86-1105

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROY DAN JACKSON PETITIONER

V.

UNITED STATES OF AMERICA RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER A FEDERAL DISTRICT COURT JUDGE RETAINS JURISDICTION TO CONSIDER PROBATION FOR A DEFENDANT FROM THE DATE OF SENTENCING TO THE DATE THE DEFENDANT IS SCHEDULED TO BE INCARCERATED UNDER 18 U.S.C. §3651 INSTEAD OF BEING BOUND BY THE 120-DAY LIMITATION FOUND IN FEDERAL RULE OF CRIMINAL PROCEDURE 35(b)?

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LIST OF PARTIES

The following is a list of all parties, their respective positions in the proceeding before the Fourth Circuit Court of Appeals, and the parties' respective counsel:

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OPINIONS BELOW

The reported opinion of the United States Court of Appeals for the Fourth Circuit is attached as Appendix A and the cite for the opinion is 802 F.2d 712 (4th Cir. 1986). The unreported decision of the District Court, Western District of Virginia is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered October 1, 1986. A petition for a rehearing en banc was filed and denied on November 25, 1986. This petition is being filed within 60 days of the date of the Fourth Circuit's denial of the en banc hearing.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction over the proceedings pursuant to Title 26 of the U.S.C. Section 7206(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure Rule 35(b):

FRCP 35, in pertinent part, is as follows:

> 35(b). A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissable reduction of sentence under this subdivision.

UNITED STATES CODE SECTION INVOLVED

Section 18 U.S.C. § 2651 in pertinent part, is as follows:

> Upon entering a judgment of conviction of any offense not

punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisified that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

TABLE OF CASES AND AUTHORITIES

Cases:

STATUTUES:

FEDERAL RULES OF CRIMINAL PROCEDURE

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

ROY DAN JACKSON PETITIONER

V.

UNITED STATES OF AMERICA RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Roy Dan Jackson, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on October 1, 1986.

STATEMENT OF THE CASE

On July 26, 1984, Roy Dan Jackson pled guilty to a one-count information charging him with filing a United States Individual Income Tax Return Form 1040 which he did not believe to be true and correct. District Judge James Turk imposed a thirty (30) month sentence on Jackson and ordered Jackson to report for confinement on October 29, 1984.

Jackson filed a motion pursuant to F.R.Crim.P. 35(b) for a reduction of the sentence on October 19, 1984. Thereafter, the district court delayed the reporting date for confinement to December 28, 1984. (JA. 73). On December 21, 1984, the district court advised that the motion to reduce the sentence was under advisement and moved the defendant's scheduled date for reporting for incarceration to March 23, 1985 (JA. 74). The Court denied Jackson's motion to reduce on February 20, 1985 and ordered Jackson to report on March 22, 1985 (JA. 72).

On March 4, 1985, Jackson filed for reconsideration of the February 20, 1985

order refusing to reduce the sentence. The district court denied the motion for reconsideration (JA. 80).

The district court learned in March 1985 that Jackson suffered serious injuries in a mining accident. On March 22, 1985, the district court extended indefinitely the reporting date of Jackson pending receipt of medical reports and medical information (JA. 81).

The government filed a motion in early October 1985 requesting a hearing to determine whether or not Jackson was totally incapacitated. (JA. 82). Following the hearing on October 17, 1985, the district court entered an order directing Jackson to report to confinement on January 6, 1986 (JA. 87).

On January 6, 1986, Jackson filed a motion asking the district court to place him on probation pursuant to 18 U.S.C. § 3651 et. seq. and under the authority of Mann v United States, 218 F.2d 936 (4th Cir. 1955) and

United States v Karp, 764 F.2d 613 (9th Cir. 1985) or otherwise reduce the term of the sentence pursuant to Rule 35(b) of the F.R.C.P. (JA. 88). On the same day, the district court filed an order stating that it did not have jurisdiction to grant Jackson's motion, but if it had jurisdiction, it would consider suspending all but six months of the thirty-month sentence and placing Jackson on supervised probation for the remainder (JA. 89).

Immediately, Jackson applied to a single-judge of the Fourth Circuit for a motion to stay the execution of the sentence and for an expedited appeal. The single judge granted the stay (JA. 91).

The Fourth Circuit decided the case on October 1, 1986. United States v Jackson, 802 F.2d 712 (4th Cir. 1986). In a two to one decision, the fourth circuit held that the time constraints of F.R.Crim.P. 35(b) prevented the district judge from considering the motion under 18 U.S.C. § 3651 (1962).

Jackson filed a motion requesting a rehearing en banc. Jackson relied on the case of United States v. Karp, 764 F.2d 613 (9th Cir. 1985) which is at odds with the fourth circuit's holding here. Also, Jackson relied on a fourth circuit decision, Mann v United States, 218 F.2d 936 (4th Cir. 1955), to support his request for an en banc hearing. The en banc hearing request was denied on November 25, 1986.

On December 2, 1986, the fourth circuit granted a stay of thirty days until a writ of certiorari could be filed with this Court. It is from these proceedings that Jackson requests a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

REASON FOR GRANTING THE WRIT

This Court should grant a writ to review the judgment of the United States Court of Appeals for the Fourth Circuit which held that the 120-day limitation found in

F.R.Crim.P. 35(b) limits the district court's jurisdiction under the Probation Act (18 U.S.C. § 3651). The opinion of the Fourth Circuit conflicts with other circuits' opinions on the exact issue. Guidance from the court is requested to resolve these conflicts.

The United States Supreme Court recognized in 1928 that a district court can order probation at any time so long as the defendant has not yet begun to serve his sentence. United States v Murray, 275 U.S. 347 (1928). The decision in Murray occurred before the enactment of F.R.Crim.P. 35(b). However, 35(b) was enacted to replace the rule which stated that a district court could not alter a judgment unless is did so in the same term of court. "Rule 35 is the successor to the district courts' former power to alter a judgment within the term in which it was entered." United States v Karp, 764 F.2d 613, 615 FN3, citing F.R.Crim.P. 35 advisory committee note. "If the power to

grant probation was not limited by the former term-of-court rule, it is consistent to hold that Rule 35, the successor to that rule, also does not limit it." Id.

The Fourth Circuit's ruling that the district court had no jurisdiction to grant probation after 120 days had elapsed ignores Supreme Court and circuit court rulings, the advisory committee notes to Rule 35, and the Probation Act. An examination of these authorities leads to a conclusion that a writ of certiorari should be granted.

Case law supports a conclusion that the 120-day limitation found in F.R.Crim.P. 35(b) does not apply to the district judges' power to act pursuant to 18 U.S.C. § 3651. The second circuit arrived at such a conclusion in United States v Ellenbogen, 390 F.2d 537 (2d. Cir. 1968). The Court in Ellenbogen noted, "The running of the 120 day period provided in Rule 35 has no effect whatsoever upon the power to suspend sentence and to grant probation." Ellenbogen, 390 F.2d at

541.

The eighth circuit in Phillips v United States, 212 F.2d 327, 334, (8th Cir. 1954) also found that "Rule 35 does not relate to the time within which the power of the court to suspend sentence for probation purposes may be exercised." The Phillips court relied on the Supreme Court decision of Murray and found that:

> "[Murray] made it clear that the power of a District Court to suspend the execution of a sentence for the purpose of probation was derived solely from the Probation Act...and had no relation to or connection with the general powers of a District Court to reduce a sentence during the time the court had power to reduce it, which when those cases were decided was during the term of court at which sentence was imposed, and is now fixed by Rule 35 of the Federal Rules of Criminal Procedure."

Id. Phillips made clear that Rule 35's predecessor had no relation to the Probation Act and therefore neither does Rule 35.

The Fourth Circuit erroneously relied on the 1979 amendment to Rule 35 to find that the 120-day limitation found in 35(b) applied

to actions under the Probation Act. In its opinion, the court emphasized the 1979 amendment to Rule 35(b) which added to Rule 35(b) only that "changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissable reduction in sentence under this subdivision." Fed.R.Crim.P. 35(b). The ninth circuit addressed the 1979 amendment to Rule 35(b) in Karp in 1984 and arrived at an opposite result.

The Karp court followed the Supreme Court's decision in Murray and found that the "sentencing court has had the power since 1925 to order probation for a convicted defendant at any time before the execution of the pronounced but unexecuted sentence begins." Karp 764 F.2d at 615. The Karp court read the 1979 amendment "as permitting a district court to place a defendant on probation when it reduces a sentence under 35(b), even if the defendant has already began serving his sentence." Id. The Karp

court recognized that the amendment allowed district courts to reduce a sentence pursuant to 35(b) if the defendant had begun to serve this sentence, which prior to the amendment, the Murray decision would not allow them to do. Id. However, no legislative intent exists to go beyond the Murray problem. Id.

The Advisory Committee Notes to the 1979 amendment evidences the intended scope of the amendment. The Committee stated:

> "Rule 35 is amended in order to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that it permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law."

Advisory Committee Notes on 1979 Amendment to Rule 35 (emphasis added). The committee used the words, "To the extent....it represents a change in law." The extent to which it changed the law was placed in the notes, no other changes are found. The Fourth Circuit in its opinion below stretched these notes to read that the 1979 amendment changed all the

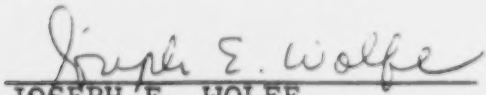
existing law which then applied to the Probation Act. Such a reading misinterprets the intention of the advisory committee. This Court should give "ordinary words their ordinary meaning."

CONCLUSION

This Court should grant the writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit's decision in United States v Jackson directly conflicts with a decision rendered by the ninth circuit in the case of United States v Karp. Also, the opinion conflicts with the Supreme Court case of Murray and other circuit opinions (second and eighth circuits). Finally, the opinion disregards the plain meaning of the advisory committee notes to F.R.Crim.P. 35(b).

For the reasons stated above, the petitioner respectfully requests that this Honorable Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,



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Appendix "A"

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 86-7001

United States of America,

Appellee,

Versus

Roy Dan Jackson

Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge. (CR 84-23).

Argued: March 4, 1986
Decided: October 1, 1986

Before WIDENER, SPROUSE and CHAPMAN, Circuit Judges.

John M. Farmer (Joseph E. Wolfe; Wolfe & Farmer); Birg E. Sergent on brief) for Appellant; E. Montgomery Tucker, Assistant United States Attorney (John P. Alderman, United Stated Attorney for brief) for Appellee.

CHAPMAN, Circuit Judge:

The question presented is whether the 120-day limitation of Federal Rule of Criminal Procedure 35(b) prevents a district judge from acting upon an unincarcerated defendant's motion for probation under 18 U.S.C. § 3659 (1962), when the district judge has already denied the defendant's timely motion for reduction of sentence (or for probation) under Rule 35(b) and when 120 days has passed since the imposition of the defendant's sentence. We conclude that the time constraints of Rule 35(b) prevent the district judge from considering the motion, and we affirm.

I

On July 26, 1984, the defendant pled guilty to a one-count information charging him with willfully and knowingly filing a United States Individual Income Tax Return Form 1040 which he did not believe to be true and correct in violation of 26 U.S.C. § 7206(1) (1982). After the district judge

considered a sentencing memorandum submitted by the United States Attorney as well as substantial evidence presented by the defendant on the issue of a proper sentence, the court imposed a sentence of thirty months. The defendant was ordered to report for confinement on October 29, 1984.

On October 19, 1984, the defendant filed a motion for reduction of sentence under Rule 35(b) and supported this motion with a report from the National Center on Institutions and Alternatives. The district judge took the motion under advisement, but delayed the defendant's date of reporting to December 28, 1984. On December 22, 1984, the district court advised that the motion for reduction of sentence was still under advisement and delayed the defendant's reporting date to March 22, 1985. On February 20, 1985, the court denied the motion for reduction of sentence and directed the defendant to report to the institution designated by the Bureau of Prisons by 3:00 p.m. on Friday, March 22,

1985, to begin the sentence imposed on July 26, 1984. On March 4, 1985, defendant filed for reconsideration of the February 20, 1985, order denying the reduction of sentence, and on March 8, 1985, the motion for reconsideration was denied. On March 22, 1985, the court learned that the defendant had been seriously injured in a mining accident, and the court issued an order extending indefinitely the date for the defendant to report to the federal institution under his sentence.

In October 1985, the government filed a motion to require defendant to immediately surrender and begin serving his sentence. Following a hearing, the court entered an order on October 18, 1985, directing the defendant to report to the institution designated by the Bureau of Prisons by 3:00 p.m. on Monday, January 6, 1986. On the morning of January 6, 1986, defendant filed another motion asking the court:

> to reduce the sentence and place

> him on probation, or otherwise reduce the term of the sentence pursuant to Rule 35(b) of the F.R.C.P. and/or pursuant to 18 U.S.C. § 3651 et seq. and under the authority of Mann v. United States, 218 F.2d 936 (4th Cir. 1955) and United States v. Karp, 764 F.2d 613 (9th Cir. 1985). This Court also has authority to alter or amend the sentence pursuant to the inherent powers of the Court.

The district court filed an order on January 6 finding that it did not have jurisdiction to grant the defendant's motions, but that if it had jurisdiction, it would consider suspending all but six months of the thirty-month sentence and placing the defendant on supervised probation for the balance of the thirty-month term.

Defendant's attorneys immediately applied to a single judge of this court for a motion to stay the date of defendant's reporting to the federal institution and seeking an expedited appeal. The single judge granted the stay, and the matter was briefed and then argued before this panel at the March 1986 term.

II

The language of Rules 35(b)[1] and 45(b)[2] seem so clear that it should not be necessary

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[1]Federal Rules of Criminal Procedure 35.
(b) Reduction of sentence. A motion to reduce a sentence may be made, or the court may reduce a sentence without motion, within 120 days after the sentence is imposed or probation is revoked or within 120 days after receipt by the court of a mandante issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of probation revocation. The court shall determine the motion within a reasonable time. Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision.

[2]Federal Rules of Criminal Procedure 45.
(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable

(Footnote Continued)

to look past them. Under 35(b) a motion for a reduction of sentence must be made within 120 days of the happening of certain events, and the only one applicable to the present case is "120 days after the sentence is imposed." The final sentence of Rule 35(b) clearly directs that the changing of a sentence from one incarceration to a grant of probation is a permissible reduction under the rule; this is the type relief that the appellant sought from the district court on January 6, 1986. It is clear from the language of the rule that such a motion for probation in place of incarceration must be made within 120 days after the sentence is imposed and that, because of the clear language of Rule 45(b) the 120-day period may not be extended by the court. The change of

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(Footnote Continued)

neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them.

a prison sentence to a shorter prison sentence and a period of probation is a reduction of the original sentence and subject to Rule 35(b) time limitations.

Appellant made his first motion for reduction of sentence in October, 1984, and this was well within the 120-day period following the imposition of his sentence. This motion was denied in February 1985. Appellant immediately moved for reconsideration of the motion, and this was also denied. There was no appeal noticed from either of these denials, and the appellant's next motion for reduction of sentence did not occur until January 6, 1986, the very day that he had been ordered to report to the federal correctional institution. This was more than one year after the 120-day period had expired. The January 1986 motion asked the court "to reduce the sentence and place him on probation or otherwise reduce the term of the

sentence pursuant to Rule 35(b) of F.R.C.P. and/or pursuant to 18 U.S.C. § 3651 et seq."

We can find nothing in 18 U.S.C. § 3651 et seq.[3] that would permit its use at so late

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[3]Title 18 U.S.C. Section 3651 provides in part.

Suspension of Sentence and Probation.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or the execution of sentence and place the defendnat on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the

(Footnote Continued)

a date in the proceedings. The Federal Probation Act was passed in 1925 and at that time Rule 35(b) did not exist. In United States v. Murray, 275 U.S. 347 (1928), the Supreme Court decided that once a person had entered upon the service of a criminal sentence, the district court had no power under the Probation Act to grant him probation even though the term of court at which the sentence was imposed had not expired. At that time, motions had to be made during the term of court. This requirement of making motion during the same term of court was one of the reasons for the adoption of Rules 35 and 45. In referring to Rule 35(b), the Advisory Committee on Rules stated:

> The first sentence of the rule continues existing law. The second sentence introduces a

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(Footnote Continued)
sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

> flexible time limitation on the power of the court to reduce a sentence, in lieu of the present limitation of the term of court. Rule 45(c) abolishes the expiration of a term of court as a time limitation, thereby necessitating the introduction of a specific time limitation as to all proceedings now governed by the term of court as a limitation. The Federal Rules of Civil Procedure (Rule 6(c)), 28 U.S.C. Appendix, abolishes the term of court as a time limitation in respect to civil actions. The two rules together thus do away with the significance of the expiration of a term of court which has largely become an anachronism.

In 1966 Rule 35 was amended: the first sentence dealing with illegal sentences became 35(a), and the time limit was changed from 60 days to 120 days and became a part of 35(b). Rule 35 was amended again in 1979, and the reason is explained by the notes of the Advisory Committee on Rules:

> Rule 35 is amended in order to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law. See

United States v. Murray, 275 U.S. 347 (1928) (Probation Act construed not to give power to district court to grant probation to convict after beginning of service of sentence, even in the same term of court); Affronti v. United States, 350 U.S. 79 (1955) (Probation Act construed to mean that after a sentence of consecutive terms on multiple counts of an indictment has been imposed and service of sentence for the first such term has commenced, the district court may not suspend sentence and grant probation as to the remaining term or terms). In construing the statute in Murray and Affronti, the Court concluded Congress could not have intended to make the probation provisions applicable during the entire period of incarceration (the only other conceivable interpretation of the statute), for this would result in undue duplication of the three methods of mitigating a sentence - probation, pardon and parole - and would impose upon district judges the added burden of responding to probation applications from prisoners throughout the service of their terms of imprisonment. Those concerns do not apply to the instant provisions, for the reduction may occur only within the time specified in subdivision (b). This change gives "meaningful effect" to the motion-to-reduce remedy by allowing the court "to consider alternatives that were avail-

able at the time of imposition of the original sentence." United States v. Golphin, 362 F. Supp. 698 (W.D. Pa. 1973).

The logical meaning of the Committee's comment, "the reduction may occur only within the time specified in subdivision (b)," is that sentences including probation are covered by Rule 35(b) time constraints; otherwise, trial judges would still have to consider probation petitions during the entire period of incarceration.

While one purpose of the time limitation is to relieve the district judge of successive petitions from criminal defendants, another important purpose is to put the issue of sentence to rest. Once the defendant realizes that this avenue of changing on his sentence is closed, he may direct his attentions to rehabilitating himself or attacking his conviction in some other way, i.e., 28 U.S.C. § 2255.

Rule 35 also allows the judge to entertain a motion to reduce a sentence even

after a defendant has started serving a period of incarceration because the rule sets a definite time frame for such motions without reference to whether a defendant is or is not incarcerated.

Appellant relies upon United States v. Karp, 764 F.2d 613 (9th Cir. 1985), but we find Karp unpersuasive. The Karp majority found that the time limitation on the reduction of a sentence under Rule 35(b) did not restrict a sentencing court's authority to order probation for a convicted defendant "at any time before the execution of the pronounced but unexecuted sentence begins." 764 F.2d at 615. The Karp majority concluded: "As noted earlier, this is not a Rule 35 case. The case challenges the trial judge's authority to order probation and nothing more." Id. at 615. We find this is not in keeping with the clear language of the rule or intent of the rule as set forth in the Advisory Committee comments. The dissent of Judge Poole in Karp is more compelling and

persuasive. He sums up his position as follows:

> Read as written, Rule 35(b) now classifies a grant of probation (after an original sentence of confinement) as a "permissible reduction." Rule 35 is concerned with time limits. The clear meaning and juxtaposition of words in the rule are sensible and compelling: A grant of probation is a reduction of sentence under 35(b) and must be made within 120 days. There is no other reason for enacting that language as it is stated, and for placing it where it is placed.
>
> I would give ordinary words their ordinary meaning and would hold that the district court in this case cannot grant probation because the limit of 120 days is long past.

764 F.2d at 618-19.

The appellant also seeks support from our decision in Mann v. United States, 218 F.2d 936 (4th Cir. 1955), but we find Mann to be distinguishable. Mann was given consecutive sentences of 15 and 20 years. He did not appeal his conviction and did not make a motion for a reduction of the sentences under Rule 35. After he had served

approximately four and one half years on the 15 year sentence, he brought an action to vacate both sentences. The district judge had a question as to his power to act and stated:

> I have very serious doubt whether after the imposition of the sentence in this case and prior to the beginning of the consecutive term, the court has power under the Probation Act to grant a modification of the sentence by suspending the consecutive term.

Id. at 938.

Our court assumed that the district judge possessed the power and decided that he had not abused his discretion in refusing to grant the motion to vacate the sentences. The court went on to address the question of the district court's power and found, pursuant to United States v. Murray, supra, that once the defendant had entered upon a sentence on one count of the indictment the court could not suspend the sentence under another count of the same indictment. Mann did not make a motion under Rule 35. Jackson

made a timely motion for a reduction of sentence under Rule 35(b) and when this motion was denied, he moved for a reconsideration of the motion, and this was also denied.

In United States v. Addonizio, 442 U.S. 178, 189 (1978) the court stated:

> And once a sentence has been imposed, the trial judge's authority to modify it is also circumscribed. Federal Rule Crim. Proc. 35 now authorizes district courts to reduce a sentence within 120 days after it is imposed or after is has been affirmed on appeal.[4] The time period, however, is jurisdictional[5] and may not be extended.

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[4]Prior to the adoption of Rule 35, the trial courts had no such authority."The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." United States v. Murray, 275 U.S. 347, 358. This rule was applied even though the change related only to the second of a pair of consecutive sentences which itself was not being served at the time. Affronti v. United States, 350 U.S. 79.

[5]See Fed. Rule Crim. Proc. 45(b); United States v. Robinson, 361 U.S. 220.

Finding that the district judge was correct in concluding that he did not have jurisdiction to consider Jackson's petition for probation under 18 U.S.C. § 3651, when he had already denied his timely motion under Rule 35(b) and more than 120 days had passed since the imposition of defendant's sentence, we affirm.

AFFIRMED.

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

Our decision in Mann v. United States, 218 F.2d 936 (45h Cir. 19550, on indistinguishable facts, comes to the opposite conclusion to that reached by the majority today.

In Mann, this court stated that Rule 35 of the Federal Rules of Criminal Procedure did not limit the power of the federal district courts to modify a defendant's sentence from incarceration to probation at any time prior to the defendant's entry into service on his sentence. Id. at 939. Accord United States v. Ellenbogen, 390 F.2d 537 (2d Cir. 1968), "The running of the 120 day period provided in Rule 35 has no effect whatsoever upon the power to suspend sentence and to grant probation." See also Phillips v. United States, 212 F.2d 327 (8th Cir.

1954); cf. United States v. Karp, 764 F.2d 613 (9th Cir. 1985). In an attempt to distinguish Mann, the majority emphasizes the fact that the defendant in Mann did not make a motion for reduction in sentence under Rule 35, but rather sought probation under the Probation Act, 18 U.S.C. §§ 3651, et. seq. The majority then distinguishes this case from Mann because it says Jackson made his initial motion for reduction in sentence pursuant to Rule 35 and not under the Probation Act. That motion is found at JA43. What the majority overlooks, however, although the motion is quoted in the majority opinion, is that Jackson made a subsequent motion for probation under the Probation Act. The denial of that motion is the order appealed from and is found at JA89. Thus, I conclude that this case is virtually indistinguishable from our previous decision in Mann and believe the majority's attempted distinction of this binding precedent to be unpersuasive.

In its opinion, the majority today also emphasizes the 1979 amendment to Rule 35(b) which added to the Rule 35(b) which existed in 1954 only that "[c]hanging a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction in sentence under this subdivision." FED. R. CRIM. PRO. 35(b). The majority concludes that as a result of this amendment, an order modifying a sentence of incarceration to one of probation is a reduction in sentence that is subject to the time limitations set forth in Rule 35(b). Thus, in essence, the majority concludes that the 1979 amendment to Rule 35(b) limited a district court's jurisdiction under the Probation Act to modify a sentence of incarceration to one of probation.

If this were a civil case, it is clear that the majority could not decide that a rule of procedure limits the statutory jurisdiction of a federal district court because Rule 82 of the Federal Rules of Civil

Procedure explicitly states that those rules can neither extend nor limit the district courts' jurisdiction or the venue of actions therein. FED. R. CIV. PRO. 82; Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978): ". . .it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." Although there is no comparable rule in the criminal context, I find the civil rule (among other things) persuasive, and I cannot conclude, as does the majority, that by the mere addition of one sentence to Rule 35(b) the Court intended to limit (even if it could) the federal district courts' jurisdiction under the Probation Act.

In the Advisory Committee Notes to the 1979 amendment to Rule 35(b), the Committee explicitly noted that the extent to which its amendment modified existing law, that is to say the law set forth in Mann. Thus, the Committee stated:

> Rule 35 is amended to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law.

Advisory Committee Noted on 1979 Amendment to Rule 35, FEDERAL CRIMINAL CODE & RULES 112 (West 1986) (emphasis added).

Significantly, the Advisory Committee Notes on Rule 35, quoted above, explicitly note, as set forth, that the amendment represents a change in the Rule to permit a judge to change a sentence of incarceration to one of probation for a defendant who has already commenced service of his term. The committee notes do not note any change in existing law for a defendant who has not commenced the service of his sentence. The existing law in this circuit is that set out by Mann, and I think that Mann must be followed absent its overruling by an en banc court.

Also of significance, the Advisory Committee did not state that it considered the 1979 amendment to Rule 35(b) to limit in any way the jurisdiction of a federal district court under the Probation Act. Indeed, although the majority correctly points out that a statement in United States v. Addonizio, 442 U.S. 178, 189 (1978), indicates that Rule 35(b)'s 120-day limitation is jurisdictional, in its notes accompanying the 1985 amendment to Rule 35(b), the Committee expressly rejected what it correctly calls the "Addonizio dictum"[1] relied upon and quoted by the majority, thereby further reinforcing my conclusion that Rule 35 does not affect federal district courts' substantive jurisdiction under the Probation Act. See Advisory Committee Note

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[1]"The time period, however, is jurisdictional and may not be extended." Addonizio, p. 189; slip op. p. 12.

to 1985 Amendment to Rule 35, FEDERAL CRIMINAL CODE & RULES, supra, at 113.

Because I believe that the majority's conclusion unjustifiably limits the federal district courts' jurisdiction as established by Congress to consider motions under the Probation Act at any time prior to the movant's incarceration, a rule previously recognized by this court in Mann, I respectfully dissent.

Appendix "B"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	
	)	
PLAINTIFF	)	
	)	CIVIL ACTION NO.
V.	)	84-00023-R
	)	
ROY DAN JACKSON	)	
	)	
DEFENDANT	)	

ORDER

This cause came for further consideration upon defendant's motion that all or part of his sentence previously imposed in this case be suspended and that he be placed on probation. Upon consideration of the matter the Court is of the opinion that it does not have jurisdiction to grant defendant's motion. The Court concedes that the defendant, while being sentenced, has not begun actually serving any part of the pronounced sentence.

For the purposes of assisting the defendant in an appeal of the Court's ruling

on this matter of jurisdiction, the Court states that if it had jurisdiction in this matter, it would consider suspending all but six (6) months of the thirty (30) month sentence imposed upon the defendant and place him on supervised probation for the balance of the term. The Court would consider this because of defendant's health and the considerable assistance defendant has been to his neighbors in the community in which he resides.

Defendant's further motion to grant him a stay of imposition of the execution date of this sentence (which is January 6, 1986), is hereby denied.

Enter this Order this 6th day of January, 1986.

/s/ James C. Turk
JUDGE

REQUESTED:

/s/ Joseph E. Wolfe
COUNSEL FOR DEFENDANT

No. 86-1105

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROY DAN JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1105

ROY DAN JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the time limitation set forth in Rule 35(b) of the Federal Rules of Criminal Procedure does not apply to a motion to reduce sentence and grant probation under 18 U.S.C. (& Supp. III) 3651.

1. On July 26, 1984, petitioner pleaded guilty to a one-count information charging him with filing a false federal income tax return, in violation of 26 U.S.C. 7206(1), and was sentenced to 30 months' imprisonment (Pet. App. A2-A3). Petitioner was ordered to begin serving his sentence on October 29, 1984. On October 19, 1984, he filed a motion for reduction of sentence pursuant to Fed. R. Crim. P. 35(b). The district court denied the motion on February 20, 1985, and directed petitioner to report for confinement on March 22, 1985 (Pet. App. A3-A4). Petitioner's motion for reconsideration of that order was denied on March 8, 1985. On March 22, 1985, the district court indefinitely extended petitioner's reporting date upon learning that petitioner had been injured in a mining accident. On October 18, 1985, the court again set a date for petitioner to begin serving his sentence (Pet. App. A4). However, on January 6, 1986, the day petitioner was

scheduled to begin his term of imprisonment, he filed a motion requesting the court to "reduce the sentence and place him on probation, or otherwise reduce the term of the sentence pursuant to Rule 35(b) of the F.R.C.P. and/or pursuant to 18 U.S.C. § 3651 *et seq.* * * *" (Pet. App. A4-A5).

The district court ruled that it did not have jurisdiction to consider petitioner's motion because it was filed more than 120 days after the imposition of sentence (Pet. App. B1-B2),[1] and the court of appeals affirmed (Pet. App. A1-A18). Execution of petitioner's sentence has been stayed pending the outcome of these proceedings (Pet. 4).

2. Petitioner contends that the time limitation of Rule 35(b) does not apply to the district court's power to grant probation under 18 U.S.C. (& Supp. III) 3651. The court of appeals correctly rejected that claim. Moreover, the present language of Rule 35(b) has been amended and 18 U.S.C. (& Supp. III) 3651 has been repealed effective November 1, 1987.[2] Accordingly, despite the fact that the court of appeals' decision is in conflict with the decision of another circuit, review by this Court is not warranted.

a. The Probation Act, passed in 1925, grants district courts the authority to suspend imposition or execution of a sentence and place the defendant on probation, but does not specify a time period within which that authority may be exercised. Rule 35(b), Fed. R. Crim. P., as amended in 1966, provides that a motion to reduce sentence must be

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[1] The district court noted that if it had jurisdiction, it would consider suspending all but six months of the 30-month sentence and placing petitioner on supervised probation for the balance of the 30-month term (Pet. App. A5).

[2] 18 U.S.C. (& Supp. III) 3651 is repealed pursuant to Pub. L. No. 98-473, Tit. II, Ch. II, § 212(a)(1), and (2), 98 Stat. 1987 (Oct. 12, 1984). Rule 35(b) is amended pursuant to Pub. L. No. 98-473, Tit. II, §§ 215(b), 235, 98 Stat. 2015, 2031 (Oct. 12, 1984), as amended by Pub. L. No. 99-217, § 4, 99 Stat. 1728 (Dec. 25, 1985), and Pub. L. No. 99-570, Tit. I, § 1009, 100 Stat. 3207 (Oct. 27, 1986).

made "within 120 days after the sentence is imposed * * *."[3] In 1979, Rule 35(b) was amended to add the following language: "Changing a sentence from a sentence of incarceration to a grant of probation shall constitute a permissible reduction of sentence under this subdivision."

The court of appeals held that any motion for probation in place of incarceration constitutes a request for reduction of sentence within the purview of Rule 35(b) and, as such, must be made within 120 days after sentence is imposed. Because the motion at issue here was filed more than one year after the expiration of the 120-day period, the court of appeals correctly ruled that the district court lacked jurisdiction to grant petitioner's motion to convert his prison sentence to one of probation.

Petitioner contends that the decision of the court of appeals conflicts with the decisions of the Second and Eighth Circuits in *United States* v. *Ellenbogen,* 390 F.2d 537 (2d Cir.), cert. denied, 393 U.S. 918 (1968), and *Phillips* v. *United States,* 212 F.2d 327 (8th Cir. 1954). There is no conflict with those cases. While those courts held that Rule 35(b) did not limit the time within which a district court could grant probation, those cases were decided before Rule 35(b) was amended in 1979. Because the 1979 amendment specifically applied the 120-day time limitation to orders changing a sentence of incarceration to a grant of probation, the pre-1979 cases cited by petitioner are readily distinguishable.

The only remaining authority cited by petitioner is *United States* v. *Karp,* 764 F.2d 613 (9th Cir. 1985), a case we believe was incorrectly decided. In *Karp,* the court concluded (*id.* at 615) that the purpose of the 1979 amendment to Rule 35(b) was to counter this Court's holding in

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[3] Pursuant to Rule 45(b)(2), Fed. R. Crim. P., as amended in 1966, the time constraints of Rule 35(b) may not be extended by the court.

United States v. *Murray*, 275 U.S. 347 (1928),[4] but that Congress did not intend the amendment to apply the time limitation of Rule 35(b) to the district court's decision to grant probation. As the court below stated in this case (Pet. App. A14), *Karp* is "not in keeping with the clear language of the rule or intent of the rule as set forth in the Advisory Committee comments" on the 1979 amendment to Rule 35(b).

The Advisory Committee explained that Rule 35 was amended in 1979 "to make it clear that a judge may, in his discretion, reduce a sentence of incarceration to probation. To the extent that this permits the judge to grant probation to a defendant who has already commenced service of a term of imprisonment, it represents a change in the law" (Rule 35 advisory committee note on 1979 Amendment, 18 U.S.C. App. at 631). The committee stated that the amendment was necessary to change the rule enunciated in *United States* v. *Murray, supra,* and *Affronti* v. *United States,* 350 U.S. 79 (1955), that the Probation Act does not empower a district judge to order probation at any time after execution of the pronounced sentence begins. The committee also noted that the concerns this Court recited in *Murray* ("undue duplication of the three methods of mitigating a sentence—probation, pardon and parole" and the additional burden upon district judges "of responding to probation applications from prisoners throughout the service of their terms of imprisonment") would not be present because "the reduction may occur only within the time specified in * * * [Rule 35(b)]." Rule 35 advisory committee note on 1979 Amendment, 18 U.S.C. App. at 631.[5]

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[4] In *United States* v. *Murray, supra,* this Court held that probation could be ordered only before a defendant began to serve any part of the sentence initially imposed.

[5] The *Karp* court apparently overlooked this statement in the advisory committee note when it concluded that the 1979 amendment "reveals no legislative intent" to make reductions of sentence to proba-

Thus, as the court of appeals correctly held, the plain language of the Rule and the accompanying committee note clearly provide that when a sentence of incarceration is changed to a grant of probation, that action shall constitute a reduction of sentence under Rule 35(b). As such, it necessarily requires application of the Rule 35(b) time constraints.

b. At all events, this case does not warrant review by the Court since both the current Rule 35(b) and 18 U.S.C. 3651 have been repealed as of November 1, 1987.

The Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 *et seq.*, creates a new sentencing guidelines system that will eliminate the need for either Section 3651 or the present Rule 35(b). There is no provision in the new legislation allowing a defendant to move for reduction of sentence. Rather, the statute provides that a sentence imposed by a district judge is subject to appeal on grounds of illegality or an incorrect application of the sentencing guidelines. The new version of Rule 35(b) will permit reduction of sentence only on application of the government. Consequently, as of November 1, 1987, the conflict among the circuits over the issue presented in this case – an issue that arises infrequently in any event – will be of only historical interest.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

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tion subject to the same time limitations as other reductions of sentence. 764 F.2d at 615.

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